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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
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No. 222.

WILLIAM MOORE AND J. S. McFERREN, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MOORE & McFERREN, APPELLANTS,

vs.

R. J. McGUIRE, E. H. WOODS, E. S. WOODS, M. Y. SCOTT, M. M. SCOTT, E. M. SCOTT, W. A. YERGER, W. H. FITZGERALD, HUBERT WILSON, AND C. L. JONES, APPELLEES.

REPLY BRIEF FOR APPELLANTS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 25444

(20,127.)

IN THE

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REPLY BRIEF FOR APPELLANTS.

We desire to call the attention of the court to and correct a few prominent *misstatements* of fact in the brief of counsel for *appellees.*

First. Adversary counsel, on first page of their brief, state that *"Island 76* is situated in the Mississippi river, and is now attached to the main shore of Mississippi and is an island only during high water."

The foregoing statement is palpably *in*correct. See deposition of *Charles Levasseur,* Record, *top* page 178, date 1905. See *Levasseur's* map, facing page 187, which shows the con-

dition of the channel east of Island 76 in 1881 and in 1899, and shows where *Calks* point was situated on the Arkansas side above Island 76, as spoken of in testimony of Capt. Marshall Miller, Wilcox, Drinkwater, and Malone, and said map is absolutely accurate, as nearly so, anyhow, as engineering science and skill can make such *survey* by actual triangulation, sounding, and measurement.

Again, this plat and survey of *Levasseur* shows the width and depth of the channel in 1881, after the change had set in, and in 1899, after the change in the channel had been going on for several years, and also the depth in 1899, as well as the sand-bar formation caused by the cutting away of *Rouses* point, above Island 76 on the Arkansas side, together with an entire plantation of original formation, including houses, gin-houses, cabins, etc.

Captain Wilcox's deposition, Record, p. 118.

Second. Another statement in the brief of appellees on page 9 thereof is misleading. It would convey the impression that witness, Capt. Marshall Miller, had been unable to work for nine years, whereas his testimony is that he had been at work as captain and pilot of boats *up to three* years before his deposition was given (Record, top page 113).

NOTE.—It was suggested by the court in Missouri *vs.* Kentucky, 11 Wal., that "barges" and "flatboats" were usually run in only high water on the Mississippi river. Now we desire to call the court's attention to the fact that in 1839, when Captain Miller first examined the channel at Island 76, as assistant pilot or student under his father (on a steamboat), it was the lowest stage of water ever known. Captain Miller says:

"Q. Was that in low or high water?
"A. Low water. It was very low. That year it was one of the lowest waters ever known.
"Q. That was in 1839?
"A. Yes, sir."
Record, p. 113.

Third. We wish to call attention to the fact that the testimony of Captain Miller as to what his father and brother told him about where the channel at Island 76 had been from 1802 and 1812 was brought out by *appellees* on cross-examination (Record, p. 113-115).

Fourth. We wish to call attention to *"Note,"* page 14 of brief for appellees. He suggests that the map facing page 366 (top page 234) of the record is incorrect in some particulars. If so, counsel for appellants do not know it. They believe it to be a reproduction of the same as actually introduced in evidence. Of course, we have not access here to the original, and only having received a copy of adversary counsel's brief on February 27, while in Washington, have had no chance to verify; but if an error has been made in the transcript that can be shown to us, we would *quickly* agree to a correction. Still we believe this somewhat peculiar map, which (so far as we can learn) never found its way into the Land Office of the United States Government (letter of the Hon. John A. Wilson, Land Commissioner, to the contrary notwithstanding), is just as introduced.

Again, said map facing page 234 seems to have the measurement from the main shore of Mississippi across to the head of Island 76 to be *29 chains,* or a little over *2,900 feet.* This measurement was made by triangulation, but sure it is that *no measurement was made by the surveyor on the map of the width of the channel at any other point.* All the rest of the channel as to width being an *eye sketch,* we will call attention to this map in another connection.

II.

Map of Island 76, Known as the Mississippi Partial Map, Produced with Deposition of E. H. Nall, Facing Top Pages 234-235 of Record.

Much stress is laid by appellees' counsel on this map, claiming that it supplements the first plat of township 21, range 8 west, made by Benjamin Griffin in 1830, purporting on its face to be a complete plat of that township and range, which plat faces top page 176 of the record.

Now, the only way the Nall map, facing page 234 of record, has any connection with the general plat of 1830 that we have been able to find is the following notation thereon, to wit, "also traverse and retraverse of Island 76," but we find no traverse and *retraverse* of the island on map facing page 234.

(*a.*) Again, the plat and survey of Island 76, facing page 234, was not made according to the acts of Congress, as we understand it, under the facts as they appear. Section 2395, Revised Statutes of the United States, is as follows:

"SEC. 2395. The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require."

Rev. Stat., U. S.

Not only must the boundaries of each section, half section, and quarter section be shown, but also the contents of each.

Id., sec. 2396.

Now, turning again to map facing page 234, we find that no attempt was made by the surveyor to divide the island

into quarter sections and half quarter sections and fractional half quarter sections by running the lines at right angles north and south, east and west, but instead laid the whole island off into lots or strips running east and west, or nearly so. *This was not necessary,* because Surveyor General Pelham, in his survey of said island in 1846 (map facing record page 172), strictly followed the acts of Congress by running his lines east and west, north and south, or nearly so, dividing into quarter sections, half quarters, and fractional half quarters, &c.

It was under the Pelham survey that the island was sold by the United States Government.

(*b.*) *Again,* this plat facing page 234 seems to be a *misfit,* all round. We are informed by the field notes (Transcript, p. 213) that the island was first surveyed to fit township 22, range 8 west, and the bank of the Mississippi at that point, but it was found that was wrong, and they dropped down to the southwest corner of township 22 and northwest corner of township 21, opposite the head of the island, and at that point, triangulated across to the island, and found the exact distance across the channel at that *time to be 2,920 feet* (*Record, p. 213*).

This certainly explodes the theory of the experts, McAndrews and Shackelford, and the old river maps, and the Downing theory, and the lower courts, expert theory as to the width and navigability of that channel at that time, 1830.

(*c.*) *Again,* in the brief appellees, on page 103 and other pages, says "both parties claimed a tax title under the different States." Now, we submit that neither the above statement, nor any similar one contained in said brief is correct.

It is true that appellees claim and derive their so-called title through and under a tax title pure and simple. Their grantor, the State of Mississippi, never had a shadow of title, and sold the lands, of which it never had possession or title

to sell, to these appellees for the princely sum of about 20 cents per acre (See deeds from Mississippi to defendants, Transcript, p. —).

(*d.*) *Again*, the appellants claim under patents issued by the United States Government to citizens of Arkansas in Arkansas and to the State of Arkansas and in strict accordance with a survey of Arkansas made by a United States surveyor of public lands, *appellants* deraigning their title down through and from these various patents (Record, p. 13 to 25; see abstract of title, Record, p. —) and various deeds and decrees.

(*e.*) It is true that *appellants' vendor*, Sallie A. Murphy, obtained her title to a large portion of said land by reason of tax delinquency, but not at a tax sale, but under a proceeding in equity on behalf of the State of Arkansas, under a statute of 1881 to foreclose a lien on the lands for unpaid taxes. See decree and proceeding and commissioners' deed (Record, p. —). The rest of said land, *51* acres, she bought outright from the State of Arkansas. It holding under a patent from the United States, *surely the court below had jurisdiction of this 51 acres.*

NOTE.—It will be noticed by turning to the abstract of title filed by appellants that these lands only became delinquent for taxes in 1879 (Record, p. —), and the liens were foreclosed in chancery and sale made in 1882, so it appears affirmatively that from 1847 or 1848, the date of patents, all taxes had been paid in Arkansas up to 1879, and all have been paid since. See Meek's deposition (Transcript, p. —).

(*f.*) Adversary counsel in his brief seems to almost stake his case on the letter of "A. Downing," written in January, 1859, to his friend, W. G. Ford, to help him, with the Gov-

ernor, to get a patent from the United States Government; and the court will see that this letter was the *"limit"* when compared with all the established facts in the case. *The learned court below, in his opinion, inadvertently,* no doubt, states that Mr. Downing wrote the letter to Governor McWillie. In this His Honor was mistaken. It was written to his friend, W. G. Ford (*if ever written*). It purports to be from one private citizen to another. Neither official nor semi-official; neither the handwriting of the letter nor the signature are shown to be that of Downing. There is no proof of any character that "A. Downing" is dead. We submit that no ranker piece of incompetent testimony was ever offered in a court of justice. Yet this letter is relied on, and much stress is given to it, and great weight it attached to it, both by the court below and adversary counsel. Certainly their argument would not be complete without it. Without it their case is not made out.

Again: But suppose the letter was genuine and competent (*it was excepted to*—see Record, p. —); yet Mr. Downing is flatly contradicted by the map of Benjamin Griffin, of 1830-'32 (facing page — of record).

It is contradicted by the Pelham map of 1846. It is contradicted by the Nall map, or Griffin map, facing page —, and field notes to same. It is contradicted by Capt. Marshall Miller, by Mrs. Burrus, and others—in fact, by all the reliable testimony in the record.

Besides this, the Hon. Thomas A. Hendricks, Commissioner of the General Land Office (Record, p. 70), wrote a letter in which he says of this Downing letter: *"If, therefore, you will add to it his* (Downing's) *affidavit,* together with the testimony of another disinterested witness," &c. Mr. Downing *never swore to that letter.* Thus the matter fell still-born. The fact is, he could tell any kind of a *tale* for his friend, *but would not swear to it.* We will leave Mr. Downing and his letter to the tender mercies of the court. *"Requiescat in pace."*

III.

Adversary counsel in his brief asserts that the testimony of Capt. Marshall Miller as to the statement of his father and brother to him in 1839, that the channel east of Island 76 had been practically the same since 1802 and during the war, is all the evidence that appellants have, traditional or otherwise, that the *deeper* channel and *main* channel and channel of commerce at the island, particularly in low water, was east of the island.

This proposition we earnestly *controvert.*

First. The Griffin map of 1830-1832 of township 21, range 8 west, shows plainly that in 1830, under a survey of Mississippi, the channel was undoubtedly on the east of the island.

Second. The map produced by E. H. Nall, showing a survey of Island 76, shows it because it *conclusively* shows that at the upper end of the island it was *2,900 feet* from the Mississippi shore to the island, and that *this* was the *only* point where the width of the channel was actually measured.

Third. Again we insist that the McRee map of Arkansas, surveyed in 1827-1829, while Arkansas was still a Territory, shows that the island belongs to the Territory of Arkansas.

It is true that McRee did not sectionize the island, but he did survey to the island and different points thereon. It will also be noticed that in crossing to the island from the lines run he did it on foot nearly, or certainly more than half way, across.

Levasseur says in his testimony as an expert, speaking from the plat and work, that evidently the surveying party practically walked across and carried the chain.

Again, Mr. McRee triangulated from the Arkansas to the Mississippi shore at both the head and foot of the island,

and sketched in the channel on the eastern side, and by placing the scale to it, it shows at that time a *broad* channel or body of water east of the island, and that the deeper channel was there.

Fourth. Again, it is conceded that appellants have conclusively established by living witnesses, outside of the maps, that in *1839* the main or commercial channel of the river was east of the island, not so wide as the west side or chute, but deeper, and the only channel in low water.

Now, having established the fact that the main channel of the river was east of the island in *1839, we have the presumption of law that it had been so for all time in the past, and so remained for all time in the future,* unless that presumption be overcome by satisfactory evidence. This proposition of law is conceded by the court below and by adversary counsel; hence we cite no authorities.

We confidently submit that appellees have not by proof and evidence overcome this *presumption.* They in fact have nothing to rely on that is pertinent and competent for any purpose, except the reconnaissance map of 1821, which has been discussed in main brief.

(*a.*) Owing to great lapse of time, the death of all witnesses to the physical cotemporaneous facts prior to 1839, we must necessarily rely upon tradition and other writings and publications of the most reliable kind and the history of the channel prior to that date. We trust that the court will permit us to say that we have searched and written to every place we could expect to find the publication known as the *Navigator,* published in Pittsburg, in 1806 to 1813, by A. Kramer, and certain maps, but were unable to find them previous to the trial in the court below; also a public map of the Mississippi river by Samuel Cummings, published by Littell, in Philadelphia, in 1822, but were unable to locate

them until to-day, and after a long search, located them, or some of them, in the Congressional Library in Washington.

(*b.*) The book known as the *Navigator,* with surveys and plats of the Mississippi river, is a carefully prepared publication, published expressly to aid and direct pilots on that river; hence prepared and verified each year to that end; hence carries with it more variety than any ordinary public map or history, because published and revised every year or two as a correct chart to aid and control navigators.

(*c.*) As to the channel at Island 76 in the year 1808, the *Navigator* says:

"Island 76 lies in middle of river. The left side of No. 76 is best in low water. The right is the nearest" (*Navigator,* 1808, p. 110).

(*d.*) As to the same point in the river the same publication for the year 1811 says:

"Island 76 lies in middle of river. The left side of No. 76 is best in low water. The right is the nearest" (*Navigator* for 1811, page 199).

(*e.*) Again Samuel Cummings' map and plats of the Mississippi river, published by Littell, at Philadelphia, in 1822, shows the eastern channel at Island 76 to be quite wide. We would say, with actual scaling, from 3,000 to 4,000 feet.

All of the above publications are in the Congressional Library. We can not get them out, but are told that the court can send for them.

(*f.*) *Can the court take judicial notice of the above public maps and publications* or look to them for the purpose of refreshing their memory or informing their conscience?

In Jones *vs.* The U. S., 137 U. S., p. 216, on this subject the court said:

"The judges may refresh their memory or inform their consciences from such sources as they may deem the most trustworthy."

Heath *vs.* Wallace, 137 U. S., 216, 138 U. S., 584, citing many cases.

Fremont *vs.* U. S., 17 How., 542, 557.

Brown *vs.* Piper, 91 U. S., 37-42.

State *vs.* Wagner, 61 Maine, 178.

"Upon the question of the existence of a public statute of the date when it took effect, they may consult the original roll or other official records."

Spring *vs.* Eve, 2 Mod., 240.

I Hale's History of Common Law (5th ed.), 19-21.

Gardner *vs.* Collector, 6 Wall., 419.

South Ottawa *vs.* Perkins, 94 U. S., 260, 267, 269, 277.

Post *vs.* Supervisors, 105 U. S., 667.

"As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the foreign office, or the department of state."

2 Simons, 220-223.

Ex parte Hitz, 111 U. S., 766.

In re Baiz, 135 U. S., 403.

IV.

We shall not attempt to follow the very learned discussion of counsel for the appellees in his brief on the questions of long adverse *possession, laches,* and *acquiescence.* What such profound philosophers and dreamers as Cicero, Aristotle, and others thought and dreamed about international law as between kings' kingdoms and empires we are content to leave them with the fossiliferous remains of past ages, and believe we can find in modern decisions something more consonant with the present age and more applicable to the

condition and relations of the American States to each other.

(*a.*) All the discussion of the questions of laches, long possession, and *acquiescence* as discussed by those ancient authors on international law applied to kingdoms, empires, and strictly foreign governments, who could not sue each other to settle their disputes because there was no tribunal having jurisdiction of their controversies, and they could only settle their differences by *treaty* or the sword. One nation had no power to force another nation to agree to a treaty, arbitrate, or litigate *so in* such cases.

A much longer time of *laches* and acquiescence was given to perfect titles by prescription than between the States of this Union, *because under our law* one independent State can sue the other at any time without the other's consent and have all their differences judicially and fairly adjusted. This fact is useless in this investigation—the ideas of the old writers on international law. In other words, the *American* rule, as established by and under a republican government should apply, and a shorter period of *laches,* possession, and acquiescence applies.

So, upon the whole case, we submit that the decree of the court below should be reversed and the appellants granted the relief prayed for.

Respectfully submitted,

D. E. Myers,
U. M. Rose,
For Appellants.